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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

GOOGLE INC.,

Plaintiff,

v.

TRAFFIC INFORMATION LLC,

Defendant.

No. CV09-642-HU

PLAINTIFF'S OPENING CLAIM CONSTRUCTION BRIEF

By Plaintiff Google Inc.

Plaintiff Google Inc. ("Google") respectfully submits its Opening Claim Construction Brief herewith.

Table of Contents

I. Summary Of Argument 1

II. Relevant Facts 2

A. Traffic's Claims Were Limited To The Display Of Pre-Existing Data 3

B. The Purpose For Traffic's Invention Is To Provide Data Relevant To Users Without Significant User Manipulation 5

III. Relevant Legal Standards 7

A. Intrinsic Evidence Must Be The Primary Guide To Claim Construction 7

B. No Need To Construe All Terms Presented 9

C. Indefinite Terms Must Be Identified As Such 10

D. The Court May Not "Re-Write" The Terms Of The Claims 12

IV. Google's Requested Construction Of Terms And Phrases 12

A. The Indefinite Terms 14

1. "Said User" 14

2. "Traffic Information" 16

3. "Less Than All Available Traffic Information" 18

4. "Representative Of" 19

B. Terms Relating To Devices Of The System 22

1. "Traffic Monitor" 22

a. A "Traffic Monitor" Is Not A "Mobile User Station" 23

b. A "Traffic Monitor" Is A Stationary Device 24

c. A "Traffic Monitor" Measures Current Speed, Frequency, Or Flow Of Multiple Vehicles 25

2. "Mobile User Station" 27

a. A "Mobile User Station" Is Distinct From A "Traffic Monitor" 27

b. A "User" Is A Commuter Who Operates A "Mobile User Station" 28

c. "Traffic Information" Is "Displayed Graphically" On A "Mobile User Station" 29

C. "Traffic Information" Terms 30

1. "Traffic Information" And "Traffic Information Representative Of Said Signals Transmitted By Said Traffic Monitors" 30

2. "Traffic Information Database" And "Traffic Information Database Containing Data Representative Of Traffic" 31

Perkins Coie LLP
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3. "Information Representative Of…Selected Portions Of Said Traffic Information Database" 33
4. "Vehicular Movement" Is Movement Of Multiple Vehicles As Detected By Traffic Monitors 33
D. The "Providing…In Response" Terms 34
1. Google Will Argue Separately That The "Providing…In Response" Terms Improperly Claim Both A System And A Method, Rendering The Claims Indefinite 34
2. "In Response To A Request…Providing" 36
a. The Response Must Minimize Manipulation By The User 36
b. The Response And The Request Must Occur Simultaneously 38
E. Terms Needing No Construction 39
V. Conclusion 41

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Portland, OR 97209-4128
Phone: 503.727.2000
Fax: 503.727.2222

Table of Authorities

Cases

Acumed LLC v.Stryker Corp., 483 F.3d 800 (2007).....24

Amgen, Inc. v. Chugai Pharm. Co., 927 F.2d 1200 (Fed. Cir. 1991).....10

Aquatex v. Techniche Solutions, 419 F.3d 1374 (2005).....26

Brown v. 3M, 265 F.3d 1349 (Fed. Cir. 2001).....10

Collegenet, Inc. v. XAP Corp., 2004 U.S. Dist. LEXIS 22370 (D. Or. October 29, 2004)...7, 9, 21

Datamize, LLC v. Plumtree Software, Inc., 417 F.3d 1342 (Fed. Cir. 2005).....11

Davis-Lynch, Inc. v. Weatherford Int'l, Inc., 2009 U.S. Dist. LEXIS 33414 (E.D. Tex. Apr. 20, 2009).....10

Default Proof Credit Card Sys. v. Home Depot U.S.A., Inc., 412 F.3d 1291 (Fed. Cir. 2005).....11

Enzo Biochem, Inc. v. Applera Corp., 599 F.3d 1325 (Fed. Cir. 2010).....18

Every Penny Counts, Inc. v. Am. Express Co., 563 F.3d 1378 (Fed. Cir. 2009).....7

Exxon Research & Eng'g Co. v. United States, 265 F.3d 1371 (Fed. Cir. 2001).....15

Hakim v. Cannon Avent Group, PLC, 479 F.3d 1313 (Fed. Cir. 2007).....8

Halliburton Energy Servs. v. M-I LLC, 514 F.3d 1244 (Fed. Cir. 2008).....21, 35

Hearing Components, Inc. v. Shure Inc., 600 F.3d 1357 (Fed. Cir. 2010).....20

Helmsderfer v. Bobrick Washroom Equip., Inc., 527 F.3d 1379 (Fed. Cir. 2008).....12

Honeywell Intl. v. ITT Indus. 452 F.3d 1312 (Fed. Cir. 2006).....27

ICU Medical Inc. v. Alaris Medical Systems, Inc., 558 F.3d 1368 (Fed. Cir. 2009).....25

Inpro II v. T-Mobile, 450 F.3d 1350 (2006).....25

IPXL Holdings, L.L.C. v. Amazon.com, Inc., 430 F.3d 1377 (Fed. Cir. 2005).....10, 11, 35

K-2 Corp. v. Salomon S.A., 191 F.3d 1356 (Fed. Cir. 1999).....12

Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).....7, 8

Microsoft Corp. v. Multi-Tech Sys., 357 F.3d 1340 (Fed. Cir. 2004).....8

Morton Int'l. Inc. v. Cardinal Chem. Co., 5 F.3d 1464 (Fed. Cir. 1993) 11

Nat'l Recovery Techs., Inc. v. Magnetic Separation Sys., Inc., 166 F.3d 1190 (Fed. Cir. 1999) 11

Novo Indus., L.P. v. Micro Molds Corp., 350 F.3d 1348 (Fed. Cir. 2003) 15

O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., 521 F.3d 1351 (Fed. Cir. 2008) 10

Phillips v. AWH Corp., 415 F.3d 1303 (Fed. Cir. 2005) 7, 8

SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc., 242 F.3d 1337 (Fed.Cir.2001) 25

Tex. Instruments, Inc. v. U.S. Int'l Trade Comm'n, 988 F.2d 1165 (Fed. Cir. 1993) 12

U.S. Surgical v. Ethicon, Inc., 103 F.3d 1554 (Fed. Cir. 1997) 9

Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576 (Fed. Cir. 1996) 8

Statutes

35 U.S.C. § 112, ¶ 2 ..... 10, 35

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I. Summary Of Argument

Despite its name, Traffic Information, LLC ("Traffic") invented neither a system for collecting real-time traffic signals, nor a system for disseminating that data, nor a mobile user station for use by commuters, as its own admissions within the specification of its patents reveal. At best, Traffic claimed to have invented only the idea of displaying "traffic information" on a map on a mobile user station, where the "traffic information" and the map were collected and disseminated utilizing pre-existing technology.[1]

Even when properly narrowed to the true focus of the invention, Traffic's patents are indefinite in describing what specific "information" is intended for display, nor do they enable the reader to determine how that information is to be derived or "represented." Though the specification provides a few examples of what might be displayed and what ought not be displayed, any reader, including someone of ordinary skill in the art, is left to guess at the scope of the phrase "traffic information." Traffic's claims should be declared indefinite (and, in a later hearing on dispositive motions, invalid for lack of enablement), or alternatively limited to what is depicted by way of example, as no definitions can be derived from the intrinsic evidence to give the claims the necessary precision. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005) ["…the line between construing terms and importing limitations can be discerned with reasonable certainty and predictability if the court's focus remains on understanding how a person of ordinary skill in the art would understand the claim terms."]

[1] Even this combination of pre-existing information and architecture was known at the time of the filing of the Traffic applications, as Google will demonstrate at the appropriate time for dispositive motions.

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In order to gloss over the claims' deficiencies, it is expected that Traffic will suggest claim term definitions that introduce indefiniteness into the claims, and that effectively "read out" or ignore phrases, such as "information representative of…," a practice that this Court has elsewhere rejected.[2] Traffic's suggested definitions take the scope of the claims well beyond the narrow scope dictated by the Examiner's reasons for allowance of the claims.

In contrast, Google offers constructions of the terms at issue based on the words of the intrinsic evidence – the specification and the prosecution history – which provide the only clues to interpreting the claims. In those instances where the boundaries for the scope of the claims simply cannot be resolved, Google has identified the terms that make the claims insolubly indefinite.

II. Relevant Facts

Traffic alleges that Google's software product "Google Maps for Mobile" ("GMM")[3] infringes U.S. Patents 6,785,606 and 6,466,862 (the "Traffic Patents," referred to individually herein by the final three numbers of the patents).[4]

The Traffic Patents are part of a larger family of fourteen related United States patent applications, originating from three provisional patent applications filed in 1999 and 2000.[5] The text of the two patents – the "specification" – is identical; only the claims of the two patents

[2] *Collegenet, Inc. v. XAP Corp.*, 2004 U.S. Dist. LEXIS 22370, at *13 (D. Or. October 29, 2004) ["It is also improper to eliminate, ignore, or 'read out' a claim limitation from a claim in order to extend a patent to subject matter disclosed, but not claimed."]
[3] GMM is software which can be utilized on cell phones and similar devices in order to display maps on the cell phone for various purposes.
[4] The '862 and '606 Patents accompany this Brief as EXHIBITS B and C, respectively. The complete prosecution histories – containing the correspondence between the Patent Office and the applicant – accompany this Brief as EXHIBITS E and F.
[5] A chart depicting the family of related applications accompanies this Brief as EXHIBIT H.

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differ. Throughout this Brief, references to the specification of the patents will be to the earlier of the two – the '862 Patent.

A. Traffic's Claims Were Limited To The Display Of Pre-Existing Data

Both patents are entitled "System For Providing Traffic Information," and have identical Abstracts describing the claimed invention in general terms:

> A system for providing traffic information to a plurality of mobile users connected to a network. The system comprises a plurality of traffic monitors, each comprising at least a traffic detector and a transmitter, the traffic detector generating a signal in response to vehicular traffic and the transmitter transmitting the signal. A receiver receives the signals from the traffic monitors. A computer system is connected to the receiver and is further connected to the network. The computer system in response to a request signal received from one of the users transmits in response thereto information representative of the signals transmitted by the traffic monitoring units. Alternative systems for gathering traffic information are disclosed.[6]

In essence, the patent claims a system in which traffic monitors generate signals from vehicular traffic and those signals are transmitted ultimately to mobile users to be displayed graphically with a map on a "mobile user station." Claim 1 of the '862 Patent is representative of the claims at issue in this case:

> 1. A system for providing traffic information to a plurality of mobile users connected to a network, comprising: (a) a plurality of traffic monitors, each said traffic monitor comprising at least a detector and a transmitter, said detector providing a signal including data representative of vehicular movement and said transmitter transmitting said signals; (b) a receiver, remotely located from said transmitter, that receives said signals transmitted by said traffic monitors; and (c) a computer system interconnected with said receiver and said network; (d) a mobile user station connected to a global positioning system receiver, a display, and a communicating device; and (e) said computer system, in response to a request for traffic information from one of said mobile user stations, providing in response thereto to said one of said mobile user stations traffic information representative of said signals transmitted by said traffic monitors; (f) wherein said traffic information transmitted by said computer system is displayed graphically

[6] '862 Patent, page one.

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> on said display; and (g) wherein said computer system has a map database, and said computer system, in response to said request for information, transmits map information representative of a portion of said map database, and said map information representative of said map database is displayed graphically together with said traffic information.[7]

The patents neither define "traffic information"[8] nor do they claim to have invented new methods of obtaining or creating "traffic information." In the "Background Of The Invention" section of the specification, the patents specifically discuss several preexisting patents, all of which are described as "methods (or systems) of providing traffic information."[9] The Examiner's statement of reasons for allowance in the '862 Patent's prosecution history cites as key prior art U.S. Patent No. 5,812,069 to Albrecht and U.S. Patent No. 5,959,577 to Fan, the former being directed to a "Method and system for forecasting traffic flows" and the latter to a "Method and structure for distribution of travel information using network."[10] In light of these two items of prior art, the Examiner based his allowance of the claims on the inclusion of element (g) of Claim 1 and element (d) of Claim 21, both of which are directed to displaying a

[7] '862 Patent, 22:34-65.

[8] The closest the specification comes to describing specifically what is meant by "traffic information" appears at '862 Patent, 1:14-16: "Commuters have a need for information relating to the congestion and traffic which they may encounter on a commute over a road, highway, or a freeway." While the specification later discusses examples of vehicular speed, direction and "flow," these parameters are set out as examples, not as definition of the information to be provided.

[9] The prior art is discussed generally at '862 Patent, 1:10 – 4:27. The references are described generally as "prior art methods of providing traffic information to commuters" at 1:18-20.

[10] See the May 20, 2002, Notice of Allowance in the prosecution history of the '862 Patent, EXHIBIT E hereto, at page 261. It is noted that the Examiner transposed two digits of the Albrecht patent number and omitted the identifying number of the Fan patent, but the reference to these two patents is clear, given the earlier rejection of most of the requested claims as unpatentable over Albrecht in view of Fan, in the Office Action of August 24, 2001, EXHIBIT E at page 224.

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map overlaid with "traffic information" on a mobile user station.[11] The '606 Patent was allowed for similar reasons.[12]

In light of the importance of the technique for display of "traffic information" to the patentability of the claims at issue, the patents' failure to describe precisely what that information consists of – and what display might be "representative of" that information – is fatal. The absence of a clear description of the scope of the information to be provided to the mobile user stations renders the claim terms containing that phrase, and the claims themselves, indefinite.

If the Court is nevertheless of the view that the terms are sufficiently definite to permit them to be construed, then the "traffic information" terms must be limited to the specific information that is described by example in the specification – information that is capable of detection and transmission by the traffic monitors as data signals. Having failed to describe precise parameters for its invention at the time of patenting, Defendant should not now be permitted to expand those indefinite parameters without bound.

B. The Purpose For Traffic's Invention Is To Provide Data Relevant To Users Without Significant User Manipulation

In discussing the deficiencies of prior art methods of getting traffic information to commuters – radio reports, television broadcasts, and websites accessible by computer[13] –

[11] EXHIBIT E, at page 262, the Notice of Allowance of May 20, 2002.
[12] The prosecution history for the '606 Patent, EXHIBIT F hereto, lacks a detailed statement regarding the reasons for allowance, explaining simply that "In light of the terminal disclaimer, claims 39-61 are found to be allowable." EXHIBIT F at page 125. The terminal disclaimer was filed by the applicant to avoid a rejection for "double patenting" – essentially an admission that the invention of the '606 Patent is the same as that described in the '862 Patent. EXHIBIT F, pgs. 101-102 and 107.
[13] These three prior art methods are set out in the "Background Of The Invention" at '862 Patent 1:21 – 2:7.

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Traffic made it clear that its invention was intended to achieve at least two important results: timely, current information about traffic, and ease of use by an individual engaged in driving a vehicle. Applicant described radio broadcasts of traffic news as "usually intermittent in nature,"[14] pointing out that television broadcasts "provide[] little useful information to a commuter…*[because]* by the time a commuter actually gets into his vehicle and enters a potentially congested area, the traffic may have changed."

As for traffic information provided through a web site, applicant noted that "a commuter who is actively driving cannot operate a computer and drive at the same time."[15] Applicant described the prior art invention of U.S. 5,982,298 to Lappenbusch as "unfortunately…complicated to operate and requires significant user interaction."[16] Summing up the advantages of the invention, applicant explained, "What is desired, therefore, is a system for providing traffic information which allows a commuter to obtain information at any time desired by the commuter…that provides information that is particularly relevant to the commuter, and that provides the information in an easily understood format that may be easily utilized by a commuter while driving."[17]

Immediacy and currency of the information, and ease of access to the information by a commuter actively engaged in driving a vehicle, are therefore key advantages claimed for the system, and any interpretation of the claims must take account of those advantages.

[14] '862 Patent, 1:24-25.
[15] '862 Patent, 2:1-3.
[16] '862 Patent, 3:7-10.
[17] '862 Patent, 4:18-27.

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III. Relevant Legal Standards

This Court is undoubtedly familiar with the general principles of claim construction. See, *Collegenet, Inc. v. XAP Corp.*, 2004 U.S. Dist. LEXIS 22370 (D. Or. October 29, 2004). The following discussion highlights principles of claim construction of particular relevance to the terms presented in this matter.

A. Intrinsic Evidence Must Be The Primary Guide To Claim Construction

It is the sole province of this Court to determine the meaning of phrases contained in the claims at issue, preparatory to the jury's comparing the claims to the accused devices or methods sold or used by the defendant. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

> The purpose of claim construction is to determine the meaning and scope of the patent claims that the plaintiff alleges have been infringed. O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., 521 F.3d 1351, 1360 (Fed. Cir. 2008). "The construction that stays true to the claim language and most naturally aligns with the patent's description of the invention will be, in the end, the correct construction." Phillips v. AWH Corp., 415 F.3d 1303, 1316 (Fed. Cir. 2005) (en banc) (quoting Renishaw PLC v. Marposs Societa' per Azioni, 158 F.3d 1243, 1250 (Fed. Cir. 1998)).

Every Penny Counts, Inc. v. Am. Express Co., 563 F.3d 1378, 1381 (Fed. Cir. 2009)

In *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) the Federal Circuit, sitting *en banc*, set out several key principles to be followed when construing claims. First, "the claims of a patent define the invention to which the patentee is entitled the right to exclude." *Id.*at 1312 (internal citation omitted). Further, the words used in a claim are generally given their ordinary and customary meaning, which "is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, *i.e.*, as of the effective filing date of the patent application." *Id.* at 1312-13.

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In construing the claims, the Court should consider, and rely primarily upon, the intrinsic evidence of record: the patent itself, including the claims, the specification, and the prosecution history. *See Vitronics Corp. v. Conceptronic, Inc.,* 90 F.3d 1576, 1582 (Fed. Cir. 1996); *see also Markman*, 52 F.3d at 979. The specification is highly relevant to claim construction, particularly when it contains special or novel definitions of claim terms, *i.e.*, when the patentee has chosen to be his own lexicographer, *see Vitronics Corp.,* 90 F.3d at 1582. Indeed, "the specification is 'the single best guide to the meaning of a disputed term'." *Phillips*, at1321.

A patent applicant's statements to the examiner at the Patent Office to obtain a patent (the "prosecution history") are relevant to determining whether the applicant limited the invention in any way in order to secure allowance of the claims. *Phillips*, 415 F.3d at 1317. Thus, one purpose of consulting the prosecution history – another form of "intrinsic evidence" – is to exclude any scope that the applicants disclaimed in order to obtain a patent. *Id.* Moreover, courts should not "construe the claims to cover subject matter broader than that which the patentee itself regarded as comprising its inventions and represented to the [Patent Office]." *Microsoft Corp. v. Multi-Tech Sys.*, 357 F.3d 1340, 1349 (Fed. Cir. 2004). A disclaimer made during prosecution applies regardless of whether the Patent Office relied on it. *Id.* at 1349-50. And when a later-filed application claims priority to an earlier-filed application (often referred to as a "parent application"), any disclaimer made during prosecution of the earlier-filed application applies equally to the later-filed application. *See Hakim v. Cannon Avent Group, PLC*, 479 F.3d 1313, 1317-18 (Fed. Cir. 2007).

While "extrinsic" evidence may be considered by the Court, it does not have the same weight normally given to intrinsic evidence, as this Court has previously explained:

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> Finally, intrinsic evidence is unambiguous, it is improper for the court to rely on extrinsic evidence to contradict the meaning of the claims. See Pitney Bowes, Inc., v. Hewlett-Packard Co., 182 F.3d 1298, 1308-9 (Fed. Cir. 1999). If, after considering the intrinsic evidence, a claim term is ambiguous, a court may look to extrinsic evidence to assist in determining the meaning or scope of terms in a claim. Vitronics, 90 F.3d at 1584. Extrinsic evidence includes expert testimony, inventor testimony, and technical treatises or articles. Id. Extrinsic evidence cannot, however, alter the clear meaning of a claim arising from the patent or prosecution history. Id.

Collegenet, Inc., at *14.

B. No Need To Construe All Terms Presented

This Court has previously remarked that it is not necessary to construe every term that may be presented to the Court by the parties:

> While claim terms "must be construed as they would be understood by a person of ordinary skill in the art to which the invention pertains," and thus, "what the claim terms would mean to laymen is irrelevant[,]" Searfoss v. Pioneer Consol. Corp., 374 F.3d 1142, 1149 (Fed. Cir. 2004), if a person of ordinary skill, in the art would understand the term in its ordinary, everyday sense, there is no need to construe the term. E.g., Biotec Biologische Naturverpackungen GmbH v. Biocorp, Inc., 249 F.3d 1341, 1349 (Fed. Cir. 2001) (district court did not err when it declined to construe "melting" when the meaning of "melting" did not depart from its ordinary meaning or otherwise require construction); Applera Corp. v. Micromass UK Ltd., 186 F. Supp. 2d 487, 524, 526 (D. Del. 2002) (court declined to construe terms "maintain," "maintaining, "and a "whereby" clause because they were clear on their face and the meaning was "self-evident"); Zip Dee, Inc. v. Dometic Corp., 63 F. Supp. 2d 868, 872 (N.D. Ill. 1998) (rejecting defendant's "artificial construct" of the term "tension" because no construction beyond the "ordinary English language meaning of the term" was required and thus, the patent's "references to tension'" [would] go to the jury without the interposition of any judicial gloss.").

Collegenet, at *38-*39.

As the Federal Circuit made clear in *U.S. Surgical v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997), claim construction is "a matter of resolution of disputed meanings and technical scope, to clarify and when necessary to explain what the patentee covered by the claims, for use

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in the determination of infringement. It is not an obligatory exercise in redundancy." Definition of claim terms that are not truly at issue between the parties or have acquired no special meaning is mere wasted effort, and can only serve to confuse the jury by adding language for their consideration. *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008)[" We, however, recognize that district courts are not (and should not be) required to construe every limitation present in a patent's asserted claims."]; *Brown v. 3M*, 265 F.3d 1349, 1352 (Fed. Cir. 2001) ["These are not technical terms of art, and do not require elaborate interpretation."]; *Davis-Lynch, Inc. v. Weatherford Int'l, Inc.*, 2009 U.S. Dist. LEXIS 33414 (E.D. Tex. Apr. 20, 2009)["The Court finds that the term 'affixed' is readily understandable for a jury and thus no construction is necessary."]

In the present case, the Court will see that Traffic has requested a construction for a number of common English terms that have not been used in a special way by the patentee and the meaning of which should be clear to any jury without further definition by the Court. In these cases, the Court is asked to decline further interpretation of the term.

C. Indefinite Terms Must Be Identified As Such

The claims of a patent must particularly point out and distinctly claim the subject matter that the patent applicant considers to be the invention. 35 U.S.C. § 112, ¶ 2. A claim does not meet this standard, and is thus considered indefinite, "if it does not reasonably apprise those skilled in the art of its scope." *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1383-84 (Fed. Cir. 2005), quoting *Amgen, Inc. v. Chugai Pharm. Co.*, 927 F.2d 1200, 1217 (Fed. Cir. 1991). The purpose of this requirement is to ensure that the claims put the public on notice of the explicit boundaries of the applicant's right to exclude others from practicing the

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applicant's invention. *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1347 (Fed. Cir. 2005)[phrase in question was "aesthetically pleasing"]. The words of the claim must be "sufficiently precise to permit a potential competitor to determine whether or not he is infringing." *Morton Int'l. Inc. v. Cardinal Chem. Co.*, 5 F.3d 1464, 1470 (Fed. Cir. 1993).

As with other aspects of claim construction, a determination of indefiniteness is a question of law for the Court. *IPXL Holdings*, 430 F.3d at 1380; see also *Default Proof Credit Card Sys. v. Home Depot U.S.A., Inc.*, 412 F.3d 1291, 1298 (Fed. Cir. 2005) ["A determination of claim indefiniteness is a legal conclusion that is drawn from the court's performance of its duty as the construer of patent claims."]. Further, an indefinite claim is invalid. See, e.g., *IPXL Holdings*, 430 F.3d at 1384 [at issue was claim language describing both a system and a method for operating the system].[18]

A claim can also be considered indefinite if it recites both a "system" and a "method for using the system." In such a case, it is unclear whether the infringement occurs when the system is created or when a user utilizes the system in the way described in the claim. In *IPXL*, the federal circuit found just such a situation in claim 25 of the patent at issue in that case, where a system was claimed, but steps for using the system were also set out as required elements of the claim. Id., at1384. A similar difficulty exists with regard to the claims of the patents in suit, as discussed briefly below. Since this variety of indefiniteness does not turn on the definition of a

[18] As a consequence of these principles, summary judgment of invalidity is proper with respect to any claim found to be indefinite as a result of claim construction. Claims dependent from that claim would also be subject to summary judgment of invalidity. See, e.g., *Datamize*, 417 F.3d at 1356; see also *Nat'l Recovery Techs., Inc. v. Magnetic Separation Sys., Inc.*, 166 F.3d 1190, 1198 (Fed. Cir. 1999) (finding dependent claims invalid because they depended on a claim that was invalid under 35 U.S.C. § 112). Rather than submit a motion for summary judgment simultaneously with this Opening Brief on Claim Construction, Google will await the Court's ruling on all requested terms, reserving the right thereafter – and based upon the ruling – to seek summary judgment regarding any claim for which terms have been found to be indefinite.

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particular term, however, Google will provide a full exposition of that argument in a motion for summary judgment, confining the present Brief to a discussion of disputed claim term meanings.

D. The Court May Not "Re-Write" The Terms Of The Claims

In the face of indefinite terms or embodiments described in the specification that do not seem to be covered by the language of the claims the Court may not "re-write" the claims for Traffic. "Courts cannot rewrite claim language." *Helmsderfer v. Bobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1383 (Fed. Cir. 2008). It is up to the applicant to choose the words used in claiming its invention, and the Court simply gives effect to those terms. *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1364 (Fed. Cir. 1999). This rule applies even when the claim as construed would not include illustrated embodiments contained in the specification. *Helmsderfer*, *supra*. "[C]ourts can neither broaden nor narrow claims to give the patentee something different than what he has set forth." *Tex. Instruments, Inc. v. U.S. Int'l Trade Comm'n*, 988 F.2d 1165, 1171 (Fed. Cir. 1993).

IV. Google's Requested Construction Of Terms And Phrases

Google requests that the claim terms at issue in this matter be construed in the manner set out in EXHIBIT A hereto,[19] a chart that includes Google's requests both for the terms it originally designated for construction and also for the additional terms designated by Traffic. For purposes of clarity in this Brief, Google has divided the terms into groups, as set out below. Some of the terms designated by Traffic are shorter portions of phrases designated by Google; in

[19] EXHIBIT A is a simplified chart derived from the Joint Claim Construction Chart submitted earlier by the parties. The Joint Claim Construction Chart is provided as EXHIBIT D.

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such instances, Google asks that the shorter phrases be construed only in context, as part of the larger phrase indicated.

- The Indefinite Terms
    - said user
    - less than all available traffic information
    - traffic information
    - traffic information representative of said signals transmitted by said traffic monitors
    - information representative of . . . selected portions of said traffic information database
    - data representative of traffic
- Terms Relating To Devices Of The System
    - traffic monitors
    - mobile user station
    - said user
    - displayed graphically
- "Traffic Information" Terms
    - traffic information representative of said signals transmitted by said traffic monitors
    - data representative of traffic
    - information representative of . . . selected portions of said traffic information database
    - traffic information
    - traffic information database
    - vehicular movement

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- The "Providing…In Response" Terms
    - in response thereto [to a request] providing to said one of said mobile user stations
    - providing in response thereto
    - providing to said one of said mobile user stations
    - in response to
- Terms Needing No Construction
    - computer system
    - interconnected
    - map database

A. The Indefinite Terms

Certain claim terms at issue are insolubly indefinite, making it impossible for the Court to arrive at an appropriate definition of the terms for the jury. Google asks that the terms discussed in this section be declared indefinite and that no definition be given for them by the Court. Later in this Brief, Google provides a preferred definition for the terms *arguendo*, should the Court determine that the terms are definite, but by doing so Google does not waive its primary position that no definition of the terms based on the intrinsic evidence is possible.

1. "Said User"

Claim 9 of the '862 Patent is dependent upon claim 1, and adds the limitation, "…wherein said user provides latitude and longitude information to said computer system." Claim 1, however, does not mention the word "user" and therefore provides no antecedent basis for the phrase "said user" in claim 9. A term lacking an antecedent basis is indefinite "where

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such basis is not otherwise present by implication or the meaning is not reasonably ascertainable." *Halliburton Energy Servs. v. M-I LLC*, 514 F.3d 1244, 1249 (Fed. Cir. 2008), quoting *Exxon Research & Eng'g Co. v. United States*, 265 F.3d 1371, 1375 (Fed. Cir. 2001).

Claim 1, in fact, specifically refers to a "mobile user station," not a "user." The distinction is significant, as claim 9 refers to the user providing latitude and longitude information to the computer system of the claim. Claim 9's reference to a "user" suggests that a human being using the system provides the latitude and longitude information. Had claim 9 instead referred to the information being provided by a "mobile user station," the implication would be that the device itself automatically provided the latitude and longitude information, presumably relying on its connection to a global positioning system.

Therefore, claim 9 contains a term that is subject to at least two possible interpretations – one that "user" really means "mobile user station" – a device – and the other that "user" means a human being operating a mobile user station. Traffic may argue that this is a mere typographical error, but the Patent Act provides a means for patent holders to seek corrections of this type from the U.S. Patent and Trademark Office, *See*, 35 U.S.C. § 254 or § 255 (the former for errors by the Office, the latter for those made by the applicant). A district court may only correct a patent if "(1) the correction is not subject to reasonable debate based on consideration of the claim language and the specification; and (2) the prosecution history does not suggest a different interpretation of the claims." *Novo Indus., L.P. v. Micro Molds Corp.*, 350 F.3d 1348, 1357 (Fed. Cir. 2003)

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There is an insoluble ambiguity regarding the meaning of "said user" caused by the lack of an antecedent basis for that term, which requires the Court to declare the term, and therefore Claim 9 of the '862 Patent, indefinite.

2. "Traffic Information"

"Traffic," though broad in its ordinary meaning[20] is a common English word undoubtedly familiar to a typical jury member. "Traffic information," however, is indefinite as used in the patent, because the specification teaches that some types of information about traffic ought to be displayed, yet teaches that other types of information about traffic are preferably not displayed. As no explanation is ever provided regarding which types of "information" about "traffic" are intended to be within the scope of the claims, a person of ordinary skill in the art reading the patent would be at a loss to know the scope of that claim term.

The specification describes the collection of signals from traffic monitors, and the transmittal of that signal data to a computer system. The signal data is utilized to provide "traffic information" to a mobile user station. In claim 1 of the '862 Patent, the signal of the monitor "include[es] data representative of vehicular movement."[21] Thereafter, the "computer system…provid[es]…traffic information representative of said signals."[22] Thus, in claim 1, the "traffic information" must be representative of the signal, and the signal must be representative of vehicular movement. Claim 22 of the '606 Patent utilizes the same limitations.[23]

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[20] See, WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE (Delair Pub'g Co., Inc. 1984); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Merriam-Webster, Inc. 1986), EXHIBIT G accompanying this brief.
[21] '862 Patent, 22:39-40.
[22] '862 Patent, 22:52-54.
[23] '606 Patent, 24:41-42, 51-52.

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In claim 21 of the '862 Patent, no "monitors" are mentioned, but the claim requires that a database exist containing "data representative of traffic."[24] Thereafter, the "computer system…provid[es]…information representative of …selected portions of said traffic information database."[25] Thus, in claim 21, the "information" provided to the mobile user station must be representative of a portion of the database, and the database must contain information representative of traffic.

The specification makes it clear that not all signal data is useful, and it describes several examples of data (e.g., commuters located at stop signs, at the side of the road, at underpasses and overpasses, or on unknown streets, and data from handheld computing devices) that should be "screened" and not used for analyzing or describing traffic (i.e., not constituting "traffic information").[26] Further, the applicant teaches away from representations of information that merely display "traffic flow relative to a single, fixed value" as being unhelpful in judging actual vehicular speed in comparison to posted speed limits.[27] However, the patent specification provides no general description of any meaningful limits on kinds of "traffic information" intended for display on user stations, therefore failing to put the public on notice of the explicit boundaries of the applicant's right to exclude others from practicing the applicant's invention.

Thus, the reader of the specification is left to speculate what sort of data about traffic is useful, and intended to be part of the invention (i.e., actual "traffic information"), and what sort is not useful, and is meant to be screened from further analysis. Because a reader cannot

[24] '862 Patent, 24:26.
[25] '862 Patent, 24:33-35.
[26] '862 Patent, 20:1 – 21:42.
[27] '862 Patent, 21:43-52.

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determine the scope of the term "traffic information" from the text of the specification, the term is indefinite.

3. "Less Than All Available Traffic Information"

Claim 22 of the '606 Patent requires that "less than all available traffic information is displayed" by the mobile user station. The previous section mentioned that the specification disparages certain types of information as unhelpful in judging actual speed of multiple vehicles traveling along a road.[28] However, the specification does not describe what amount of traffic information "less than all available" is included within the scope of this claim. "Less than all available" is a term of degree used to describe the boundaries of the claim, but no standard for measuring the appropriate degree of traffic information to be provided is given in the specification.

The Federal Circuit has explained that,

> [w]hen a "word of degree" is used, the court must determine whether the patent provides "some standard for measuring that degree." Seattle Box Co., Inc. v. Indus. Crating & Packing, Inc., 731 F.2d 818, 826 (Fed. Cir. 1984).

Enzo Biochem, Inc. v. Applera Corp., 599 F.3d 1325, 1332 (Fed. Cir. 2010). In the present case, however, no measure is provided to the reader by the specification to determine what portions of the collected traffic information should be provided, or what amount "less than all available" is sufficient to practice the invention. The Court should hold claim 22 of the '606 Patent invalid based upon the indefiniteness of the phrase "less than all available traffic information."

[28] '862 Patent, 21:43-52.

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4. "Representative Of"

Three terms in dispute between the parties employ the phrase "representative of": "traffic information representative of said signals transmitted by said traffic monitors," "information representative of . . . selected portions of said traffic information database," and "data representative of traffic."

The ambiguity arises from the use of the word "representative" in each instance. Applicant could have expressed these limitations without any reference to the word, for example claiming an invention where, in response to a request for traffic information, the computer system provides "data from said signals transmitted by said traffic monitors." In such an instance, an accused infringer could determine whether that element of the claim was practiced by the accused system by inquiring whether signal data from traffic monitors was being transmitted to mobile user stations.

The present formulation of the claims, however, blurs the description of what precisely is provided to the mobile user station by requiring only that whatever is provided be "representative of" the data contained in the signals. This ambiguity renders invalid the collection and presentation steps that were used by the applicant to distinguish the claimed invention over the prior art. After discussing various prior art methods of providing traffic information to drivers, applicant asserts in the specification, "While all of the above systems provide some degree of traffic information for a commuter, nevertheless the above systems do not provide an efficient method of collecting and presenting objective traffic information to a commuter."[29] Thus, the specific method of collecting, processing and presenting traffic information was identified by the

[29] '862 Patent, 4:15-18.

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applicant as a key aspect of the invention, yet the rest of the written description provides no instruction regarding how the raw signal data is to be manipulated or processed to "represent" current traffic, other than by way of a few examples.

There is also ambiguity as to whether the invention includes the display of raw data signals from the traffic monitors. The specification suggests that the "raw" signal from a monitor is not itself "representative of traffic" by explicitly distinguishing between the two types of data:

> The computer system 40 either sends the raw traffic data requested by the user, or sends a signal representative of the map and/or traffic database which may be used by the user station 52 to represent the map and traffic information on the display 54.[30]

The distinction made here suggests that "representative of" requires some processing of the raw signal data, yet the written description offers no explanation of the standards by which the processed data is judged to be useful. The Federal Circuit has explained that,

> [t]he purpose of the definiteness requirement is to ensure that "the claims, as interpreted in view of the written description, adequately perform their function of notifying the public of the scope of the patentee's right to exclude." Honeywell Int'l, Inc. v. Int'l Trade Comm'n, 341 F.3d 1332, 1339 (Fed. Cir. 2003) (quotation marks omitted).

Hearing Components, Inc. v. Shure Inc., 600 F.3d 1357, 1367 (Fed. Cir. 2010). In the present instance, it is not possible to determine what information provided by a computer system is "representative of traffic" as required by the claims, because no method is described for creating useful representations – only examples of unhelpful representations are provided.

It is expected that Traffic will take the position that "traffic information representative of said signals transmitted by said traffic monitors" and "data representative of traffic" each simply

[30] '862 Patent, 15:42-46.

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means "traffic information." Traffic argues that "information representative of…selected portions of said traffic information database" means "certain data from the traffic information database."[31] In each case, Traffic simply "reads out" of the claim the "representative of…" language that is problematic. This Court, however, has cautioned against any construction that gives no weight to claim language:

> It is also improper to eliminate, ignore, or "read out" a claim limitation from a claim in order to extend a patent to subject matter disclosed, but not claimed. See, e.g., Ethicon Endo-Surgery, Inc. v. United States Surgical Corp., 93 F.3d 1572, 1582-83 (Fed. Cir. 1996) (court cannot read a limitation out of a claim); see also Unique Concepts, Inc. v. Brown, 939 F.2d 1558, 1562 (Fed. Cir. 1991) (patentee cannot be allowed to expressly state throughout specification and claims that his invention includes a limitation and then be allowed to avoid that claim limitation in infringement suit by pointing to one part of specification stating an alternative lacking the specification).

Collegenet, at *12 - *13. Traffic's suggestion that the Court simply ignore the "representative of" language in the claims is itself evidence that this phrase inserts a problematic ambiguity into the language of the claims. The Court should conclude that the claims containing these phrases are indefinite in violation of 35 U.S.C. § 112, ¶ 2.[32]

One of the "representative of…" phrases for construction has the additional modifier that the "information" is "representative of…selected portions of said traffic information database." The phrase is indefinite as the specification fails to identify who or what "selects" portions of the

[31] See Exhibit A.

[32] Later in this Brief Google proposes constructions for all the phrases argued in the present section to be indefinite. Google presents the alternative constructions only for the situation in which the Court concludes that the phrases are definite, and does not, by presenting those constructions, waive its argument regarding definiteness. Indeed, as the Federal Circuit has held, "The fact that *[applicant]I* can articulate a definition supported by the specification, however, does not end the inquiry. Even if a claim term's definition can be reduced to words, the claim is still indefinite if a person of ordinary skill in the art cannot translate the definition into meaningfully precise claim scope." *Halliburton*, at 1251.

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database and how that information is selected. For example, the phrase might require that the user of the mobile user station select the portion of the database to be displayed, or that the computer system performs the selection automatically. Traffic argues that "selected portions" simply means "certain data," ignoring the question of who selects or what data is selected. Such a definition would "read out" the term "selected," essentially requiring only that "portions" of the database be provided to the mobile user station. As with Traffic's effort to ignore the phrase "representative of," the Court should refuse Traffic's efforts now to rewrite claim language that is ambiguous.

B. Terms Relating To Devices Of The System

1. "Traffic Monitor"

"Traffic monitor" should be construed as "a stationary device capable of determining the current speed, frequency, or flow of multiple vehicles traveling along a road." Google anticipates that Traffic Information will advocate a construction that includes "any device" used to measure vehicular movement – presumably including stationary as well as mobile devices – so that it can argue regarding infringement that a mobile phone is both a "traffic monitor" and a "mobile user station." Such a construction would impermissibly broaden the scope of the claims and render meaningless the distinction made by the patentee between the two distinct devices described in the patent as being capable of measuring vehicular movement – "traffic monitors" and "mobile user stations."

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a. A "Traffic Monitor" Is Not A "Mobile User Station"

The key to understanding the meaning of '"traffic monitors" is the distinction drawn between "mobile user stations" and "traffic monitors" in the patents. The '862 Patent claims, in Claim 1, a system for providing traffic information that is comprised of a network of traffic monitors as well as a mobile user station that receives and displays the traffic information transmitted by the traffic monitors.[33] So does Claim 22 of the '606 Patent.[34] By contrast, Claim 21 of the '862 Patent claims a system that employs signals received from "a plurality of mobile user stations," but that claim element does not include traffic monitors. The patentee left "traffic monitors" out of Claim 21 for a reason. The specification notes: "Thus, the system may provide traffic information without the use of [traffic] monitors 20 at all, relying solely on information derived from the mobile user stations 52."[35] Clearly, the same device cannot be both a traffic monitor and a mobile user station.

A significant portion of the specification is dedicated to explaining that the mobile user stations are not traffic monitors:

> Alternatively, where the number of users is sufficiently large, the traffic monitors 20 may no longer be necessary, because the users themselves through mobile user stations 52 and GPS receivers 62 provide enough traffic information to generate useful displays of traffic information. Thus, the system may provide traffic information without the use of monitors 20 at all, relying solely on information derived from the mobile user stations 52. . . . Thus, the combination of the mobile user station 52, GPS receiver and transmitting and receiving units 64 provides an especially advantageous method for collecting traffic information. . . . In addition, the system has a significant cost advantage in that it is not necessary to install traffic monitors 20, or at least the number of traffic monitors 20 that are necessary can be substantially reduced. . . . Furthermore, the system is low maintenance, since there are no traffic monitors 20 to maintain. The system is also particularly robust, in that if a particular mobile user station 52 malfunctions,

[33] '862 Patent, 22:52-55.
[34] '606 Patent, 24:51-53.
[35] '862 Patent, 13:19-21 (emphasis added).

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> traffic information can still be collected for all locations based on data reported by other mobile users. In contrast, if a stationary sensor 20 fails, no data can be collected from that location. Thus, the collection of traffic data from a plurality of mobile user stations 52 to create a traffic information database provides surprising advantages and a superior system for providing traffic information.[36]

In patent claims, different words are presumed to have different meanings. *Acumed LLC v.Stryker Corp.*, 483 F.3d 800, 807 (2007). Google's proposed construction gives meaning to both "traffic monitor" and "mobile user station" consistent with the intrinsic evidence of the specification and the claims.

b. A "Traffic Monitor" Is A Stationary Device

The specification depicts a traffic monitor only as a stationary device that measures the current speed, frequency, or flow of multiple vehicles traveling along a road. The Summary of the Invention states: "The traffic information database may be derived from information obtained from stationary traffic monitors, mobile user stations, or a combination thereof."[37] Figures 1, 2, 7, and 11 of both the '862 Patent and the '606 Patent show only stationary devices when referencing traffic monitors (depicted as item 20). In fact, the patents describe a system that combines signals from mobile user stations as advantageous because it provides superior information "than that collected by stationary sensors" such as the detectors in traffic monitors, and more cost advantageous because "it is not necessary to install traffic monitors 20" for example, on every road.[38] Moreover, the system based on mobile user stations is superior because "if a stationary sensor 20 fails, no data can be collected from that location."[39]

[36] '862 patent, 13:14-57 (emphasis added).
[37] '862 Patent, 5:16-18 (emphasis added).
[38] '862 Patent, 13:33-44 (emphasis added).
[39] '862 Patent, 13:52-53 (emphasis added).

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Traffic ignores the specification and seeks to extend the scope of the claim far beyond what is supported by the specification so that it can argue that a mobile phone can be both a "traffic monitor" and a "mobile user station." While "claims need not be limited to the preferred embodiment when the invention is more broadly described, 'neither do the claims enlarge what is patented beyond what the inventor has described as the invention.'" *Inpro II v. T-Mobile*, 450 F.3d 1350, 1355 (2006) ["district court correctly observed that the only host interface described in the specification is a direct parallel bus interface"]; *SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1341 (Fed.Cir.2001) [claim scope limited where written description enabled only catheters with coaxial lumens]; *ICU Medical Inc. v. Alaris Medical Systems, Inc.*, 558 F.3d 1368, 1375-76 (Fed. Cir. 2009) [construing "spike" to require pointed spike where "[t]he specification never suggests that the spike can be anything other than pointed" and "every embodiment in the specification … uses a spike to pierce the seal"]. Traffic is not entitled to a broad claim meaning divorced from the context of the specification. The Court should not construe claims to cover subject matter broader than what a patentee describes in its specification, which reveals what the patentee regarded as comprising its invention.

c. A "Traffic Monitor" Measures Current Speed, Frequency, Or Flow Of Multiple Vehicles

The word "traffic" has many general definitions that are applicable in a variety of contexts. In the context of vehicular traffic, however, the common understanding of "traffic" contains two basic features – traffic is a measure of multiple vehicles traveling along a road. [A single vehicle in isolation cannot constitute "traffic."] These defining features are consistent

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with the standard dictionary definition of "traffic,"[40] as well as the patent. Figures 1, 7, 811, 13, 14, and 15 of the '862 Patent and the '606 Patent all show multiple vehicles traveling along a road. Because the patents show only the movement of multiple vehicles along a road, those terms referencing "traffic" must be construed consistently and within the bounds disclosed by the patent. *Aquatex v. Techniche Solutions*, 419 F.3d 1374 (2005); *Inpro II*, 450 F.3d at 1355; *SciMed Life Sys.*, 242 F.3d at 1341; *ICU Medical Inc.*, 558 F.3d at 1375-76. .

In the Detailed Description of the Preferred Embodiments, the specification explains that "the traffic monitors 20 measure traffic information by detecting the speed (velocity) or frequency of vehicles traveling along the road (freeway or highway) 12."[41] The specification further describes that "The traffic monitors 20 detect or otherwise sense traffic to provide traffic information. The traffic monitors 20 may detect or otherwise calculate vehicle speed, average vehicle speed, traffic flow, vehicle frequency, or other data representative of the traffic."[42]

The specification repeatedly refers to multiple vehicles being measured for speed, frequency and flow: "[f]or example, the detector 22 could measure the average speed of the vehicles (cars or trucks) 14 at locations along the road 12, or it could measure the individual speed (velocities) of each vehicle 14. The detector 22 may detect vehicle frequency, that is, the frequency at which vehicles pass a certain point, or may measure traffic flow, consisting of the number of vehicles passing a certain point for a unit of time (e.g., vehicles per second).[43]

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[40] See, WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE (Delair Pub'g Co., Inc. 1984); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Merriam-Webster, Inc. 1986), EXHIBIT G accompanying this brief.
[41] '862 Patent, 6:16-19.
[42] '862 Patent, 9:56-61.
[43] '862 Patent, 6:24-39 (emphasis on multiple "vehicles" or "velocities" added).

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Furthermore, the information detected by the traffic monitor and displayed on the mobile user station must be current. The specification explains that "[a] user can obtain immediate and contemporaneous traffic conditions, such as average vehicular speed, traffic flow, or vehicle frequency, for a plurality of locations along a road."[44] Importantly, the patentee distinguished the claimed invention from prior art that provided "stale information" and showed "slow response to quickly changing traffic conditions"[45] "Preferably, the GPS location is sent together with the current time at the user station so that delays incurred in transmission do not change the result."[46] By describing its system as providing "immediate and contemporaneous traffic conditions" and distinguishing the system over the prior art on that basis, the patentee expressly defined the limited scope of the invention. *Honeywell Intl. v. ITT Indus.* 452 F.3d 1312, 1319-20 (Fed. Cir. 2006).

Accordingly, "traffic monitor" should be construed as "a stationary device capable of determining the current speed, frequency, or flow of multiple vehicles traveling along a road."

2. "Mobile User Station"

a. A "Mobile User Station" Is Distinct From A "Traffic Monitor"

"Mobile user station" should be construed to mean "a mobile device, distinct from a traffic monitor, capable of determining and displaying traffic information." As discussed above in relation to the term "traffic monitor," the specification goes to great length to distinguish between a "mobile user station" and a "traffic monitor," explaining that the two are not the same

[44] '862 Patent, 10:15-17.
[45] '862 Patent, 1:53 and 2:7.
[46] '862 Patent, 12:61-64.

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for purposes of the invention's specification and claims. For the reasons discussed above regarding "traffic monitors," "mobile user stations" must be defined in a way distinguishing them from "traffic monitors;" Google proposes that the phrase mean, "A mobile device, distinct from a traffic monitor, capable of determining and displaying traffic information"

b. A "User" Is A Commuter Who Operates A "Mobile User Station"

The term "said user" was shown, above, to be indefinite because it lacks an antecedent. If the Court chooses to provide a definition, however, Google alternatively proposes that it mean "a person who operates a mobile user station." This term is presented in only one of the asserted claims in the Traffic Patents, claim 9 in the '862 Patent.

The specification indicates that "user" is an alternative term for "commuter:" ". . . the system provides the relevant traffic information to the commuter or user on a timely basis."[47] Earlier in the specification, albeit describing the prior art, it is indicated that the commuter is not a device, but a person: "Thus, for a person commuting in a car, the system displays traffic information for many areas not of interest to the commuter."[48] The specification of the '862 Patent is replete with references to users, mobile user stations or user stations, and instances where the user and the mobile user station interact. Never does the specification indicate that a user is anything but a person.

Traffic is expected to argue that "said user" means a "mobile user station" in order to support an argument that antecedent basis exists in Claim 1. As shown above, however, the user and the mobile user station cannot be the same entity.

[47] '862 Patent, 12:33-35.
[48] '862 Patent, 1:61-63.

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c. "Traffic Information" Is "Displayed Graphically" On A "Mobile User Station"

Google argues that the term "displayed graphically" simply means "represented other than in text format." The term "displayed graphically" is found in independent claims 1 and 21 of the '862 Patent, and claim 22 of the '606 Patent.

The specification provides examples of the display of the claimed system, including what type of information is displayed and how it is displayed. Notably, the specification distinguishes between graphic and text representations:

> The computer system 40 provides data from its memory which is 30 representative of the road 12, such as data from a map database, which is displayed as a road 112 on the display 54. The computer system 40 also provides traffic information collected by each, or a selected set, of the respective traffic monitors 20 which is displayed in portions 114a-114d . . .. In the exemplary display shown in FIG. 3, the portions 114a-114d display different colors or patterns representative of average vehicle speeds (for example, in miles per hour) along different portions of the road 112. . . . It is not necessary to provide a graphical representation of the road 12. Instead, information could be provided in a textual manner . . ..[49]

Figures 3, 6, 8, and 13-15 of the Traffic Patents depict exemplary embodiments of the disclosed system's display. Of these figures, only figures 3 and 6 depict providing a "text message," depicted as item 130. Item 130 is described as distinct from the traffic information which is claimed to be displayed graphically:

> The system 10 preferably further includes the ability to send messages about road conditions. FIG. 3 shows such an exemplary message 130 in text format. The computer system 40 is capable of storing data messages and transmitting the data messages with the traffic information. The data messages would indicate items of particular interest to the commuter. For example, the text message 130 could indicate that there was an accident at a particular location or milepost, that construction was occurring at another location or milepost, or that highway conditions were particularly severe and that alternative routes should be selected.

[49] '862 Patent, 9:29-42 and 50-52.

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> The system 10 could provide multiple messages through which the user could scroll so as to receive different messages in addition to the traffic information received from the various traffic monitors 20.[50]

In the same vein, the specification describes the alternative use of graphical and textual representations for the information to be displayed by the system: "The computer system 40 automatically sends to the user station 52 . . . the traffic information collected from the traffic monitoring units 20. The information could be sent to be displayed, such as in FIG. 3, or could be sent alternatively in a text or graphical format via e-mail."[51]

Traffic's proposed definition does not dispute that "graphically" implies a display other than in text, but it adds unnecessary additional language: "information representative of the map database and the traffic information are displayed in a pictorial format, such as a drawing, on the display of the mobile user station. Other information may be displayed, as well." The additional language proposed by Traffic is unnecessary and should be ignored for purposes of claim construction.

C. "Traffic Information" Terms

1. "Traffic Information" And "Traffic Information Representative Of Said Signals Transmitted By Said Traffic Monitors"

The patentee chose to describe the information transmitted to and displayed on mobile user stations as "traffic information representative of said signals transmitted by said traffic monitors." If the Court determines that the phrase "representative of" is definite, then it should construe the term as limited to the information transmitted by traffic monitors, namely "the current speed, frequency, or flow of multiple vehicles traveling along a road as detected by one

[50] '862 Patent, 10:38-52 (emphasis added).
[51] '862 Patent, 11:7-12.

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or more traffic monitors." Google's proposed construction includes a limitation "as detected by one or more traffic monitors" that is identified in the claims themselves, "said signals transmitted by said traffic monitors." The remainder of Google's proposed construction is explained above, in reference to Google's proposed construction of "traffic monitor."

Traffic Information proffers a construction of "traffic information representative of said signals transmitted by said traffic monitors" that reads out the phrase "transmitted by said traffic monitors." This proposed construction ignores the fact that the claims distinguish between traffic information transmitted by traffic monitors and information that is obtained from mobile user stations and maintained in a "traffic information database." These distinctions are important, because the patents explicitly describe how the information is gathered and displayed differently in different asserted claims. Notably, the language in Claim 1 of the '862 Patent and Claim 22 of the '606 Patent claim a system that provides to the mobile user stations traffic information collected and supplied by the traffic monitors. By contrast, Claim 21 of the '862 Patent claims a system that functions based on information gathered from users/mobile user stations and maintained in a "traffic information database." Traffic is attempting to broaden the claims, conflating a "traffic monitor" with a "mobile user station" by ignoring the specific language chosen by the patentee.

2. "Traffic Information Database" And "Traffic Information Database Containing Data Representative Of Traffic"

The term "traffic information database" is defined in Claim 21 of the '862 Patent as "containing data representative of traffic." As noted elsewhere, the use of the phrase "representative of" renders the claim indefinite. Alternatively, "traffic information database"

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should be construed to mean "a database containing the current speed, frequency, or flow of multiple vehicles traveling along a road."

"Traffic information database" is not subject to the same limitations as "traffic information representative of said signals transmitted by said traffic monitors." In fact, as described by the patents, the traffic information database contains information derived from mobile user stations such as the network of mobile user stations described in Claim 21 of the '862 Patent.[52] The traffic information database may be used "to calibrate the traffic information provided by monitors 20, or to supplement the traffic information provided by the traffic monitors 20."[53] Thus, the "traffic information database" claimed in Claim 21 of the '862 Patent necessarily includes information obtained from mobile user stations, as opposed to "traffic information representative of said signals transmitted by said traffic monitors," which is limited solely to information transmitted by traffic monitors.

Defendant ignores the context in which the term "traffic information database" is used in the patents and instead proffers the broad construction, "a collection of traffic information." This acontextual definition is, however, no definition at all as it provides no additional information from which a reader of the patent can determine the boundaries of the "traffic information" included within the database. In contrast, the specification describes the "traffic information database" at length in a manner that gives meaning and context to an otherwise meaningless phrase. The Court should adopt Google's construction because it is rooted in the specifics set out in the patent, unlike Traffic Information's construction, which renders a vague term even more vague.

[52] '862 Patent, 13:1-10; '606 Patent, 13:4-13.
[53] '862 Patent, 13:10-14; '606 Patent, 13:14-17.

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3. "Information Representative Of…Selected Portions Of Said Traffic Information Database"

As argued above, the term "information representative of…selected portions of said traffic information database" is indefinite because the patent fails to identify who or what "selects" portions of the database and the kind of information that is selected. If the Court determines that the term is not ambiguous, however, the term should be construed as a subset of the "traffic information database" (i.e., as "the current speed, frequency, or flow of multiple vehicles traveling along a road") "which is selected by the commuter." This construction is consistent with Google's proposed construction of "traffic information database," above, with further clarification as to who selects the portions of the database. The only reference in the patent to selection of information refers to the user selecting the information to be displayed.[54]

4. "Vehicular Movement" Is Movement Of Multiple Vehicles As Detected By Traffic Monitors

The patents equate "vehicular movement" with "traffic information" and in particular with "traffic information representative of said signals transmitted by said traffic monitors." In both Claim 1 of the '862 Patent and Claim 22 of the '606 Patent, where the term "vehicular movement" appears, the claims state that the traffic monitors provide "a signal including data representative of vehicular movement" and that the computer system then provides to the mobile user stations "traffic information representative of said signals transmitted by said traffic monitors." Thus, the traffic information that is displayed by the mobile user station is made up of the signals transmitted by the traffic monitors.

[54] '862 Patent, 16:57-62; '606 Patent, 16:61-66.

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It is important therefore that "data representative of vehicular movement" be understood as equivalent to the data provided as "traffic information," since the signal including "data representative of vehicular movement" is the antecedent basis for the "said signals" represented as the traffic information transmitted by traffic monitors. The Court should therefore provide a construction for "vehicular movement" that is identical to the construction for "traffic information," *viz.*, "the current speed, frequency, or flow of multiple vehicles traveling along a road as detected by one or more traffic monitors."

D. The "Providing…In Response" Terms

1. Google Will Argue Separately That The "Providing…In Response" Terms Improperly Claim Both A System And A Method, Rendering The Claims Indefinite

In addition to the arguments for indefiniteness set out above, Claims 1, 4, 9, 10, 21, 23, 25, 31 and 32 of the '862 Patent are indefinite because they attempt to claim both a system and a method for using that system. The indefinite nature of these claims is not related to the meaning of the words of the claim, but rather to the simple fact that the claims clearly describe both a "system" and a "method" (i.e., steps to be taken by a user and by the computer system of the system to practice a method related to the system). For example, claim 21 of the '862 Patent is directed to "A system for providing traffic information to a plurality of mobile users connected to a network…",[55] but also contains two required method steps, (1) requesting information ("at least one of said mobile user stations providing a request to said computer system for information); and (2) providing information in response to the request ("in response thereto said

[55] '862 Patent, 24:13-14.

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computer system providing to said one of said mobile user stations information….").[56] Thus, the claim describes both a system for providing traffic information, and a prescribed set of steps for using the system: requesting the information and providing the information.

The phrases "providing" and "requesting" do not themselves require definition – they are common English words and are used in a typical manner in the patent. However, as noted *supra*, "Even if a claim term's definition can be reduced to words, the claim is still indefinite if a person of ordinary skill in the art cannot translate the definition into meaningfully precise claim scope." *Halliburton*, at 1251. Despite the clarity of the individual words "providing" and "requesting," the claims at issue are insolubly indefinite because, in the words of the Federal Circuit in *IPXL*, "it is unclear whether infringement…occurs when one creates a system…or whether infringement occurs when the user actually uses *[the system]*…. Because *[the claim at issue]* recites both a system and the method for using that system, it does not apprise a person of ordinary skill in the art of its scope, and is invalid under section 112, paragraph 2." *IPXL*, at 1384 (emphasis added).[57]

Since this variety of indefiniteness is not entwined with term definition, Google does not ask in the present Brief for a judgment of invalidity based on this argument. Google reserves the right, however, to seek such a judgment at the appropriate time, and respectfully suggests to the Court that an early summary judgment briefing on the issue may be the most efficient course.

[56] '862 Patent, 24:28-37.
[57] 35 U.S.C. § 112, ¶ 2 provides: "The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention."

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2. "In Response To A Request…Providing"

Putting aside the issue of indefiniteness for claiming both a system and a method, the "providing . . . in response" terms, must be construed to mean "in response to a commuter's request, providing relevant traffic information for display by the mobile user station to minimize manipulation by the commuter while driving, the request and the response occurring simultaneously." In the specification, minimization of manipulation by the commuter was argued by the patentee to be both a goal of the invention, and a key failure of prior art systems. Immediacy of the information was also pointed out as a goal of the invention.

a. **The Response Must Minimize Manipulation By The User**

Minimizing the driver's manipulation of the mobile user station needed to make a request for traffic information is a goal of the '862 Patent, and is touted by the patentee as an improvement over prior art patents. Significantly, in describing the drawbacks of the prior art systems, the '862 Patent discusses systems that:

> . . . provide a map for a large area. Thus, for a person commuting in a car, the system displays traffic information for many areas not of interest to the commuter. In addition, these types of systems require manipulation by the commuter to find the relevant traffic information. . . . However, a commuter who is actively driving cannot operate a computer and drive at the same time.[58]

The '862 Patent further characterizes the problems with the prior art stating, "[u]nfortunately, the system taught by Lappenbusch et al. is complicated to operate and requires significant user interaction to provide relevant data, which is suitable for such 'stationary' traditional computing devices."[59]

[58] '862 Patent, 1:60-67 and 2:1-3 (emphasis added).
[59] '862 Patent, 3:8-11 (emphasis added).

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After discussing the drawbacks of the prior art systems, including manipulation by the commuter of the mobile user station to make a request for traffic information while driving, the '862 Patent distinguishes itself from the prior art by stating, "[w]hat is desired, therefore, is a system for providing traffic information . . . that provides information that is particularly relevant to the commuter, and that provides the information in an easily understood format that may be easily utilized by a commuter while driving."[60] It is an object of the '862 Patent to minimize manipulation by the commuter of the mobile user station while driving as is espoused in the specification, such as the statement:

> The present invention provides several alternative methods for displaying traffic information to a commuter using a mobile user station 52. These various alternatives allow the user to customize the display 54 to provide the desired information, and to minimize the amount of operation needed while driving.[61]

Other features of the '862 Patent are also aimed at achieving this goal, for example:

> A particular advantage of the Centered Display as discussed above is that the location of the user can immediately be ascertained from a quick glance at the display 54, because the location of the user is always at the center of the display 54. The user is not required to adjust the display 54 inputting information to the user station 52 in order to constantly view the surrounding traffic information, even as the location of the user changes. Thus a commuter, by selecting the Centered Display, may view constantly updated traffic information for his location without requiring any input from the commuter.[62]

Also, "[t]he use of key pads to select the mode in which information is displayed has several advantages. The key pads eliminate fumbling by the commuter, and thus are safer to use than a keyboard" while driving.[63] Applicant has therefore clearly disclaimed any system of requesting

[60] '862 Patent, 4:18-27 (emphasis added).
[61] '862 Patent, 16:57-62 (emphasis added).
[62] '862 Patent, 17:24-34 (emphasis added).
[63] '862 Patent, 19:63-64.

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and providing information that requires significant manipulation of the mobile user station by the user.

b. **The Response And The Request Must Occur Simultaneously**

In independent claims 1 and 21 of the '862 Patent, quoted above, a mobile user station "requests" information and a computer system "provides" information in response to the request. These methods are claimed in relation to the uses of the claimed apparatus, i.e. a mobile user station requesting information and a computer system responding to the request. The language used is distinguished from other limitations that merely recite the function of an apparatus, such as element (b) of claim 21 of the '862 Patent, which claims, ". . . said computer system being capable of sending and receiving signals to and from said mobile user stations . . ." (emphasis added). Whereas the contested claim elements recite the apparatus (affirmatively claimed in a previous element) in the act of performing the claimed method, element (b) of claim 21 recites only that the apparatus is "capable of" executing a specific function. Applicant's use of different claiming strategies in the same patent demonstrates applicant's awareness of the way in which one can claim a structure including a mere statement that the apparatus is configured for or capable of certain actions.

Therefore, "providing…in response" must not be read simply as a statement of the capability of the system but rather as a statement of the necessary elements of the system. As such, the phrase must be construed as requiring that the "request" and the "response" occur simultaneously, because that is the only way that the system would be in complete existence at one time and all of the method steps necessary for infringement would be fulfilled. Indeed, the

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specification of the '862 Patent touts the advantages of the disclosed system by repeatedly claiming:

> . . . a significant advantage in that it allows the commuter to immediately determine traffic information in the commuter's immediate vicinity based on the commuter's present location. The commuter does not have to wait for a periodic traffic report. Further, traffic conditions are provided at a plurality of locations, and the information is contemporaneous.[64]

It stands to reason, if the system allows for the commuter to *immediately* determine traffic information, that to obtain such information the request for information and response to that request must occur simultaneously. Otherwise, any separation in time of the two events would destroy the immediacy of the information.

In light of all of the intrinsic evidence, the "providing . . . in response" terms should be construed to mean, "in response to a commuter's request, providing relevant traffic information for display by the mobile user station to minimize manipulation by the commuter while driving, the request and the response necessarily occurring simultaneously."

E. Terms Needing No Construction

It is unnecessary for a court to construe all of the claims indentified by the parties in a patent dispute. As this Court has previously noted, "[w]hile claim terms 'must be construed as they would be understood by a person of ordinary skill in the art to which the invention pertains,' . . . if a person of ordinary skill, in the art would understand the term in its ordinary, everyday sense, there is no need to construe the term." *Collegenet*, at *38-*39. The Federal Circuit has stated that the words used in a claim are generally given their ordinary and customary meaning, which "is the meaning that the term would have to a person of ordinary skill in the art in question

[64] '862 Patent, 12:63-64 and 10:15-18 (emphasis added).

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at the time of the invention, *i.e.*, as of the effective filing date of the patent application." *Phillips*, at 1312-13.

Three terms identified by Traffic are common English expressions having no special meaning in the context of the specification, and should not be further defined by the Court: computer system, interconnected, and map database.

"Computer system" is used throughout the claims of the Traffic Patents without varying from the extensive and consistent use of the term in the specification. None of the disclosures of the term computer system, either in the claims or the specification, diverge from what one ordinarily skilled in the art would understand a computer system to comprise or how a computer system may function.

Similarly, the term "interconnected" is a term commonly used in the art, and although sparingly used in the specification of the Traffic Patents, it is used consistently in the claims. In the pertinent claims, interconnected is always used in the following phrase: "a computer system interconnected with said receiver [or another communicating device] and said [or a] network." It would be clear to one of ordinary skill in the art from the usage of the term "interconnected" that the meaning of "interconnected" as used in the Traffic Patents comports with the ordinary and everyday sense of the term.

The term "map database" is used in the '862 Patent in its ordinary, everyday sense within the art. The '862 Patent refers to the prior art disclosure of a map database in at least a prior patent cited in the Background of the Invention section.[65] Such disclosure is indicative of the common knowledge and meaning of the term to those of ordinary skill in the art. In the '862

[65] '862 Patent, 3:12-15.

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Patent's use of the term "map database," there is no divergence from the ordinary, everyday sense of the term as understood by one of ordinary skill in the art.

There is no confusion as to the meaning of each of these three terms, and thus there is no need to construe these terms.

V. Conclusion

Google respectfully asks that the Court issue its Order construing the terms of the patents at issue as set out in Exhibit A hereto under the column reflecting Google's position.

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Respectfully submitted,

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LIST OF EXHIBITS

A	-	Simplified chart of proposed claim term definitions
B	-	U.S. 6,466,862, “System for providing traffic information”
C	-	U.S. 6,785,606, “System for providing traffic information”
D	-	Joint claim construction chart
E	-	File history, SN 09/550,476 (‘862 Patent)
F.	-	File history, SN 10/367,162 (‘606 Patent)
G	-	Dictionary definitions
H	-	Chart of related applications